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STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

JOAN M. GLASS,

Plaintiff-Appellant,

v

RICHARD A. GOECKEL and
KATHLEEN D. GOECKEL,

Defendants-Appellees.

Supreme Court Docket No. 126409

Court of Appeals Docket No. 242641

Alcona Circuit Court No. 01-10713-CK

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BRIEF OF LEGISLATOR AMICI

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STATEMENT OF QUESTIONS PRESENTED

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Trial Court's Answer:	Did not answer.
Plaintiff-Appellant's Answer:	No.
Defendants-Appellees' Answer:	Yes.
Court of Appeals' Answer:	Yes.
Amici's Answer:	Yes.

II. UNDER MICHIGAN COMMON LAW EXISTING UPON ITS ADMISSION TO THE UNION, WERE MICHIGAN'S SHORES VESTED IN ADJACENT RIPARIANS?

Trial Court's Answer:	Did not answer.
Plaintiff-Appellant's Answer:	No.
Defendants-Appellees' Answer:	Yes.
Court of Appeals' Answer:	Yes.
Amici's Answer:	Yes.

III. DOES MICHIGAN COMMON LAW CONTINUE TO FIND ITS SHORES VESTED IN ADJACENT UPLAND OWNERS?

Trial Court's Answer:	Did not answer.
Plaintiff-Appellant's Answer:	No.
Defendants-Appellees' Answer:	Yes.
Court of Appeals' Answer:	Yes.
Amici's Answer:	Yes.

IV. IS THE RESULT REACHED BY THE *PETERMAN* COURT ENTIRELY CONSISTENT WITH THE COMMON LAW AS DEFINED IN *HILT*?

Trial Court's Answer:	Did not answer.
Plaintiff-Appellant's Answer:	No.
Defendants-Appellees' Answer:	Yes.
Court of Appeals' Answer:	Yes.
Amici's Answer:	Yes.

V. HAVE EITHER PLAINTIFF OR HER AMICI DEMONSTRATED A NEED TO DECLARE A CHANGE IN MICHIGAN'S COMMON LAW?

Trial Court's Answer:	Did not answer.
Plaintiff-Appellant's Answer:	Yes.
Defendants-Appellees' Answer:	No.
Court of Appeals' Answer:	No.
Amici's Answer:	No.

STATEMENT OF FACTS

Amici Curiae adopt Appellees' Counter Statement of Facts.

INTEREST OF AMICI CURIAE

The Legislator Amici submitting this Brief are Representative Brian Palmer (District 36), Senator Jim Barcia (District 31), Representative Daniel Acciavatti (District 32), Representative Fran Amos (District 43), Representative Richard Ball (District 85), Representative Rick Baxter (District 64), Representative Darwin Booher (District 102), Representative Jack Brandenburg (District 24), Representative Tom Casperson (District 108), Representative Leon Drolet (District 33), Representative Edward Gaffney (District 1), Representative John Garfield (District 45), Representative Robert Gosselin (District 41), Representative Kevin Green (District 77), Representative Dave Hildenbrand (District 86), Representative Jack Hoogendyk (District 61), Representative Joe Hune (District 47), Representative Rick Jones (District 71), Representative Roger Kahn (District 94), Representative Philip LaJoy (District 21), Representative David Law (District 39), Representative Jim Marleau (District 46), Representative Tom Meyer (District 84), Representative Leslie Mortimer (District 65), Representative Neal Nitz (District 78), Representative John Pastor (District 19), Representative Phil Pavlov (District 81), Representative Tom Pearce (District 73), Representative John Proos IV (District 79), Representative David Robertson (District 51), Representative Tonya Schuitmaker (District 80), Representative Rick Shaffer (District 59), Representative Fulton Sheen (District 88), Representative John Stahl (District 82), Representative John Stakoe (District 44), Representative Glenn Steil (District 72), Representative Shelley Taub (District 40), Representative Barb Vander Veen (District 89), and Representative Lorence Wenke (District 63) (all hereinafter referred to as either "Legislator Amici" or "Amici").

At the time of adoption of the Great Lakes Submerged Lands Act in 1955, and all amendments thereafter, the outstanding decision from this Court on the issue of riparian ownership was *Hilt* v *Weber*, 252 Mich 198; 233 NW 159 (1930) . That decision overruled

aberrant cases decided during the preceding decade, and reinstated earlier Michigan common law doctrine setting the boundary between state and riparian ownership at the water's edge.[1] The Legislature is presumed to have acted with full knowledge of the common law as determined by precedential decisions of this Court. The Great Lakes Submerged Lands Act must therefore be presumed to have been enacted with knowledge that under Michigan common law, the state did not have an ownership interest in lands lying above the water's edge.

This is highly significant because the Great Lakes Submerged Lands Act by its own terms applies only to lands "owned by the state or held in trust by it." Therefore, under this Court's *Hilt* decision, the lands covered by the Act do not include lands lying above the water's edge. Legislator Amici write to support this interpretation of the statute in specific response to recent assertions in late-filed briefs submitted by the Senate Democratic Caucus (see page 2) and the MDEQ (see page 8) that title to dry lands between the water's edge and the statutorily designated "ordinary high water mark" is in the state, thus giving a meaning to the Great Lakes Submerged Lands Act that was never intended by the Legislature. While other acts grant regulatory authority over privately owned shorelands (see, e.g. MCL 324.32301 *et seq.*), Legislator Amici submit that the Great Lakes Submerged Lands Act was never intended to apply to dry shorelands which, applying Michigan common law, this Court has determined are owned by adjacent riparians. Amici herein, as legislators of this great state, are keenly interested in both the proper interpretation of legislative enactments and maintaining consistency in the property law of this state.

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[1] Moreover, at least during the time period immediately following the Act's adoption, the executive branch similarly interpreted the law. See *People* v *Broedell*, 365 Mich 201; 112 NW2d 517 (1961).

ORDER APPEALED FROM AND RELIEF REQUESTED

Plaintiff-Appellant ("Plaintiff") has been granted leave to appeal the May 13, 2004 published opinion of the Court of Appeals, *Glass* v *Goeckel*, 262 Mich App 29; 683 NW2d 719 (2004), which reversed the trial court's grant of summary disposition to Plaintiff and remanded for entry of an order granting Defendants-Appellees' ("Defendants") motion for summary disposition. By an order entered on November 19, 2004, this Court granted Defendants' motion to confirm that the issue of title to previously submerged lands will be heard by the Court and should be briefed by the parties.

The Court of Appeals' opinion included two principal holdings: (1) pursuant to *Hilt* v *Weber*, 252 Mich 198; 233 NW 159 (1930) and subsequent cases, riparian property owners on the Great Lakes have the right to exclusive use and enjoyment of their land to the water's edge and, therefore, the public has no right of passage over dry land between the low and high water mark; and (2) Part 325, Section 2 of the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.32502,[2] does not modify, but rather affirms, the rule set forth in *Hilt* and subsequent cases.

Amici urge the Court to affirm the Court of Appeals' decision, but do so on the basis that *Hilt* and numerous Michigan cases establish that Great Lakes riparian property owners not only have the right to exclusive use of their property to the water's edge, but in fact have *title* to their property to the water's edge, free of any public trust interest of the state in the submerged lands of the Great Lakes.

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[2] Part 325 of NREPA was formerly known as the Great Lakes Submerged Land Act (the "GLSLA"), MCL 322.701, *et seq.*, which was repealed by 1995 PA 59.

ARGUMENT

I. MICHIGAN COMMON LAW CONTROLS THE QUESTION OF OWNERSHIP OF MICHIGAN'S SHORES

Plaintiff and amici such as Michigan Department of Environmental Quality ("MDEQ")/Michigan Department of Natural Resources ("MDNR") and Tip of the Mitt rely upon *Illinois Central RR Co* v *Illinois*, 146 US 387; 13 S Ct 110; 36 L Ed 1018 (1892) and *Shively* v *Bowlby*, 152 US 1; 14 S Ct 548; 38 L Ed 33 (1894) for the proposition that upon statehood in 1837, the State of Michigan took **fee title** not only to the soil beneath the Great Lakes bounding Michigan shores in public trust, but title to *the shores* themselves. Plaintiff's Brief, pp 13-14; MDEQ/MDNR Brief, p 4; Tip of the Mitt's Brief at pp 21-23. They further argue that because of this public trust ownership of the shores, riparian owners could never have acquired any fee title, as the public trust doctrine precludes divestiture by the state. Plaintiff's Brief, pp 13-14; MDEQ/MDNR Brief, p 6. Because the first proposition is wrong, this Court need not reach the second. As explained below, upon statehood, and with all conveyances thereafter, any land above the water's edge vested in adjacent upland owners, as provided by Michigan common law. From that point forward, under Michigan common law, any land above the water's edge, as the lakes rose and fell, was acquired or lost by that adjacent owner.

A. The *Illinois Central* Decision Did Not Address the Question of Shore Ownership

Appellant and various supporting amici assert at various points in their briefs that the holding in *Illinois Central* set an immutable boundary line between private and public ownership of Great Lakes shorelands at the "high water mark."[3] In reality, neither the precise location of

[3] As noted by Appellant in her reply brief at page 3, there was a subsequent case before the Supreme Court involving the claims asserted by the Illinois Central Railroad Company to ownership of submerged lands in Lake Michigan. *Illinois Central Railroad Company* v *Chicago*, 176 US 646; 20 S Ct 509; 44 L Ed 622 (1900). The two decisions will be designated chronologically as *Illinois*

the dividing line between public and private ownership nor the concept of using the "high water mark" as that boundary was even an issue in that case. Thus, in *Illinois Central (I)*, the railroad had constructed its tracks on a 200 foot-wide tract of land which had previously been reclaimed from the waters of Lake Michigan. There is no doubt this area was lakeward of the Lake Michigan shoreline. 146 US at 443-444; *see also* 176 US at 648-649. As to that reclaimed area, the only dispute pertained to slips, wharves and piers associated with the land, the question being whether such piers were constructed so far out into the waters as to impact navigability. The Supreme Court determined that insufficient evidence had been produced below so as to determine whether the piers extended so far into the water as to impact navigability. 146 US at 447. As to the reclaimed land itself, the Supreme Court found no valid objection to the railroad's use of the land. 146 US at 447-448.

The Court then turned to the railroad's claim of ownership of submerged lands in the harbor. These lands were located east of (lakeward from) the breakwater built by the railroad on the east (lakeward side) of the reclaimed area. 146 US at 450. In addressing this issue, the Court was clearly focused upon lands actually covered by the waters of Lake Michigan. Further, given the filling and reclamation of the shore which passed without objection by the Court, it is clear that these submerged lands were well lakeward of what would have been the water's edge at the time Illinois became a state. Thus, there was no question to be addressed in the *Illinois Central (I)* case regarding the exact location of the boundary line between public or private interests as it would have existed when Illinois became a state. When the Court referred to "submerged lands," such were indeed under water at the time of Illinois' statehood and at the time of the case.

Central (I) and *Illinois Central (II)*. Note also that the majority opinion in *Illinois Central (I)* represented the views of only four justices. Three others had dissented, while two did not participate because of their relationships with the Railroad.

Appellant's arguments at pages 2-3 of her reply brief that somehow the *Illinois Central* court's reference to "submerged lands" referred to lands landward of the water's edge ignores the facts of the case.

In reality, all the *Illinois Central (I)* decision did was to hold that the sovereign owned the submerged beds of non-tidal navigable water bodies such as the Great Lakes, and that at the time of statehood, Illinois acquired dominion and control of such rights. Given the lack of any question that the "submerged" lands in *Illinois Central (I)* were indeed under water at all relevant times, there was no question that the State of Illinois held a public trust interest in them.

The decision does not, however, in any way indicate that the public trust extends to any permanently fixed line along the Great Lakes shore. Nor, in fact, did the decision involve a determination as to the State's interest (if any) in property located landward of the water's edge.

Appellant argues at page 3 of her reply brief that *Illinois Central (II)* makes it clear that *Illinois Central (I)* fixed a permanent boundary line for the public trust interest along the Great Lakes shoreline, citing to the following language in the *Illinois Central (II)* opinion: "the 'submerged lands' of the Great Lakes held in trust for the public by the State unequivocally extend to high-water mark." Appellant's reply brief at page 3, emphasis in original. Neither the quote from *Illinois Central (II)* relied upon by Appellant nor the actual holding in that case support Appellant's conclusion.

First, with regard to the holding in *Illinois Central (II)*, an examination of the facts set forth in the U.S. Supreme Court opinion, as well as the Illinois Supreme Court opinion from which the appeal to the U.S. Supreme Court was taken, *Illinois Central Railroad County* v *City of Chicago*, 173 Ill 471; 50 NE 1104 (1898), discloses that the lands involved were again lakeward of the 200 foot right-of-way the railroad previously used to construct its tracks in the

waters of Lake Michigan. As stated by the Illinois Supreme Court, "The land here involved is no part of the 200 feet selected or granted for right-of-way, but it is a tract covered by water beyond the right-of-way . . ." 50 NE at 1107. Thus, in neither *Illinois Central (I)* nor *Illinois Central (II)* was the U.S. Supreme Court called upon to determine where exactly along the Great Lakes shoreline any dividing line existed between the public and private interests. In both cases, there is no doubt the claims asserted by the railroad pertained to land which then was and always had been beneath the waters of Lake Michigan.

With regard to the quote from *Illinois Central (II)* referencing "the high water mark" as a boundary, it is important to note two things. First, the general rule being set forth is conditioned upon the "absence of any local statute or usage." 176 US at 660. Contrary local usage – which subsequent sections of this brief clearly demonstrate exists in Michigan – is, therefore, sufficient to establish a different boundary. Second, *Illinois Central (II)* cites to the Supreme Court's decision in *Shively* v *Bowlby*, *supra,* which was decided between dates of the Court's two decisions in *Illinois Central (I) and (II).* As will be discussed next, the *Shively* case holds that the dividing line between public and private interests along the shores of navigable waters such as the Great Lakes is a matter of state, not federal law; that there is no general rule imposed by federal law or otherwise; and that the precise location of the boundary must therefore be determined by reference to the law of the state which is involved.

B. The *Shively* Decision Acknowledges that This State's Law Governs

Citing only generally to *Shively* at 152 US 26-32, the MDEQ/MDNR brief boldly asserts that "[t]he public trust title originally conveyed to the various states extended to the high water mark in all navigable waters." MDEQ/MDNR Brief, p 4. See also Plaintiff's Brief, p 14. This characterization of *Shively* could not be more wrong. The true holding of *Shively*, discussed in

detail below, is that the question regarding the boundary of the public trust at the shoreline is one of state common law, and that the answer may therefore be different in each state.

The *Shively* opinion is divided into ten well-organized sections. In section one, the *Shively* Court explains how, under English common law, all lands of the sea below the high water mark were titled in the King. The Supreme Court offers the following reason for the English rule: "Such waters, and the land which they cover, either at all times, **or at least when the tide is in,** are incapable of ordinary and private occupation, cultivation, and improvement . . ." *Id.* at 11.[4] Instead, the "natural and primary uses are public in their nature, for highways of navigation and commerce . . . and for the purposes of fishing by all the King's subjects." *Id.* Nevertheless, such land could be held privately, either by grant, prescription, or usage:

> "Yet they may belong to the subject in point of propriety, not only by charter or grant whereof there can be little doubt, but also by prescription or usage." *Id.*, citing Harg, Law Tracts, pp 11, 12.

In such case, the private claim remains subject to a "public interest, a *jus publicum*, of passage and repassage with their goods **by water**, and must not be obstructed by nuisances [emphasis added]." *Id.* at 12.

Some states have consistently followed this English common law rule and held that, upon achieving statehood, the state took title to the high water mark in public trust. **But other states have chosen a different course, and their courts have found the common law rule to be**

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[4] This temporal reference by the *Shively* Court is not insignificant. In this reference to the English rule, the shores were incapable of ordinary and private use only when the land was covered by water. The corollary of this rule is that when the shores are not covered by water, they *are* subject to ordinary and private use. Applying this corollary to the Great Lakes, when the waters recede, the exposed shore, no longer covered by water, is capable of ordinary and private use. The residents, cottagers, hoteliers, and manufacturers of today, owning 70% of Michigan's 3,288 miles of shoreline, and who use the shores for family gatherings, recreation, lounging, and business pursuits, certainly would agree. Also in accord would have been the ice gatherers, manufacturers, fishing companies, loggers, and wharf owners of the past, who used the shores for their business pursuits in the early development of this great state.

modified in their jurisdictions to suit their own circumstances, and the customs and usages that developed. As a result, it is wholly inaccurate to say, as MDEQ/MDNR does, that "the public trust" was "conveyed to the various states extending to the high water mark in all navigable waters, and that upon statehood, each state acquired public trust ownership of the shores of all navigable water bodies." MDEQ/MDNR Brief, p 12. The *Shively* Court instead determined in Section 2 of its decision the following:

> "The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, **except so far as it has been modified** by the charters, constitutions, statutes, or **usages of the several colonies and states,** or by the constitution and laws of the United States." *Shively* at 14 [emphasis added].

Shively then noted that many colonies, prior to statehood, had already recognized private rights below the ordinary high water mark:

> "The governments of the several colonies, with a view to induce persons to erect wharves for the benefit of navigation and commerce, early allowed to the owners of the lands bounding on tide waters greater rights and privileges in the shore, below high water mark, than they had in England; but the nature and degree of such rights and privileges differed in the different colonies, and in some were created by statute, while in others they rested **upon usage only**." *Id.* at 18 [emphasis added].

The *Shively* Court then undertook a survey of the original 13 colonies, explicating each colony's rules on shoreline ownership and how it came to be.[5] Upon completion of its survey, the *Shively* Court concluded:

> "The foregoing summary of the laws of the original states shows that there is **no universal and uniform law on the subject**, but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is

[5] Of the 13 original colonies, it appears from *Shively*'s survey that 6 favored the high water mark (with Connecticut granting exclusive use to lands below, subject to right of navigation); 5 favored the low water mark; and 2 fit neither category.

> necessary in applying precedents in one state to cases arising in another." *Id.* at 26 [emphasis added].

Notably, the *Shively* Court offered no criticism of Pennsylvania's low water mark rule, even though it did not trace the rule to a legislative action.

In section 4 of its decision, the *Shively* Court found that all new states have "the same rights as the original states in the tide waters, and in the lands below the high-water mark, within their respective jurisdictions." *Id.* As in the case of the 13 colonies, such rights were subject to the common law. Thus, the *Shively* Court quoted from *Pollard's Lessee* v *Hagan*, 3 How 212 (1844):

> "Alabama is therefore entitled to the sovereignty and jurisdiction over all territory within her limits, **subject to the common law**, to the same extent that Georgia possessed it before she ceded it to the United States." *Shively* at 27 [emphasis added].

Further, inconsistent with the brash position of the MDEQ/MDNR cited above, the *Shively* Court emphasized that there was no "general rule, independent of local law or usage," that governed the various rights in the soil under navigable water below high water mark. *Shively* at 37. *Shively* then surveyed three cases, two from Wisconsin and one from Minnesota, to demonstrate that the US Supreme Court "distinctly recognized the diversity of laws and usages in the different states on this subject." *Id.* "And none of the three cases called for the laying down or defining of any general rule, independent of local law or usage, or of the particular facts before the Court." *Id.* The *Shively* Court went on to survey a number of subsequent cases to establish its proposition that "the title and rights of riparian or littoral proprietors in the soil below high-water mark of navigable waters are governed by the local laws of the several states. . . ." *Id.* at 40 [emphasis added]. Among the decisions cited by *Shively* are the following:

> "In the absence of [general] legislation or [immemorial usage], however, the common-law rule would govern the rights of the proprietor, at least in those states where the common law obtains." *Id.* at 41, citing *Weber* v *Commissioners*, 85 US 57; 21 L Ed 798; 18 Wall 57 (1873);
>
> "...whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states...As an incident of such ownership, the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the state, either to low or high water mark, or will extend to the middle of the stream." *Id.* at 44, citing *Packer* v *Bird*, 137 US 661; 11 S Ct 210; 34 L Ed 819 (1891);
>
> "The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi River, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property, which is governed by the local law of Illinois." *Id.* at 46, citing *St Louis* v *Rutz*, 138 US 226; 11 S Ct 337; 34 L Ed 941 (1891);
>
> "Beyond all dispute, the settled law of this court, established by repeated decisions, is that the question how far the title of the riparian owner extends is one of local law. For a determination of that question, the statutes of the state and the decisions of its highest court furnish the best and the final authority." *Id.* at 47, citing *Hardin* v *Jordan*, 140 US 371; 11 S Ct 808; 35 L Ed 428 (1891) (citing dissenting opinion of Brewer, J).

Finally, the *Shively* Court considered the question before it: the ownership of the shore of the Columbia River, a tidal body of water. Had the rule been as the MDEQ/MDNR suggests, the *Shively* Court could have simply proclaimed ownership to the high water mark for the state. Instead, the Court found it appropriate to consider the common law of Oregon as determined by its Supreme Court:

> "The settlers of Oregon, like the colonists of the Atlantic States, coming from a country in which the common law prevailed, to one that had no organized government, took with them, as their birthright, the principles of the common law, **so far as suited to their condition in their new home.** The jurisprudence of Oregon, therefore is based on the common law. [citation omitted]. By the law of the State of Oregon, as declared and established by the decisions of its Supreme Court, the owner of upland bounding or navigable water has no title in the adjoining lands below high water mark. . . ." *Id.* at 52 [emphasis added].

Turning to the facts of the case, the *Shively* Court noted that the state had, by statute,[6] offered to sell the tidal lands fronting Mr. Shively's property to him and other similarly situated owners adjacent to tidal waters. Shively refused, the state sold the land, and the new buyer erected a wharf along the shore "which extended several hundred feet into the Columbia River, and at which ocean and river craft were meant to receive and discharge freight." *Id.* at 53. Shively's grantee sued for title, but lost, the Oregon Supreme Court finding that since the state owned the land, it was properly conveyed to the wharf owner, whose title from the state the Court was unwilling to divest.[7]

Contrary to the assertions of the MDEQ, the lesson from *Shively* is not that the state of Michigan upon achieving statehood acquired fee title to its Great Lakes shores up to the high water mark, and that such title could never be conveyed. Instead, the lesson is that upon achieving statehood, Michigan law determines the fee to the shores and soils under its navigable waters.

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[6] The purpose of the statute was to prevent washing away of the shores; to prevent shoaling; and to encourage adjacent owners on harbors to make improvements. Owners that failed to buy within three years lost the right to do so, and allowed the state to sell the shore to another state resident. *Shively*, 152 US at 53.

[7] Notably, the Oregon Supreme Court in *Shively* concluded:

> "From these considerations it results – if men are to be bound by the previous adjudications of this court, which have become a rule of property, and upon the faith of which important rights and titles have become vested, and large expenditures have been made and incurred – that the defendants have no rights or interests in the lands in question." *Shively*, 152 US at 352.

II. UNDER MICHIGAN COMMON LAW EXISTING UPON ITS ADMISSION TO THE UNION, MICHIGAN'S SHORES WERE VESTED IN ADJACENT RIPARIANS

Since the *Shively* Court directed the issue not to some general rule, but to the laws and usage of the several states, the question presented is squarely one of Michigan law.[8] The determination of what Michigan has determined on the subject is a matter which involves a survey of the common law, as well as Michigan's "constitution, statutes, [and] usages," both before and after statehood. *Shively* at 14.

A. Upon Admission to the Union, Michigan's Shores Became Subject to Its Existing Common Law

While it is generally recognized that all states but Louisiana have adopted the "common law," it is important to understand what they have actually adopted. The term "common law" takes many forms. For example, with regard to the Seventh Amendment's reference to "suits at common law" and "rules of common law," the United States Supreme Court has determined the reference as being to the common law of England, as opposed to the common law of any state at any point in time. CJS, Common Law, § 1, citing *C Elliot & Co* v *Toeppner*, 187 US 327; 23 S Ct 133; 47 L Ed 200 (1902).

In contrast, upon formation, "the 13 original states, in their constitutions and declarations of rights, recognized the common law as it had prevailed **in the colonies** [emphasis added]." 15A Am Jur 2d, Common Law, §14. For example, Massachusetts traces its use of the common law to its first colony; it was continued in its 1692 provincial charter; and in its constitution, it adopted the common law previously "used and approved, in the province, colony or state of

[8] Recall that the United States Supreme Court looked to Illinois law in deciding the scope and extent of the state's title along the Lake Michigan shore. *Illinois Central,* 176 US at 659.

Massachusetts Bay, and usually practiced on in the courts of law. . . ." *Commonwealth* v *York*, 50 Mass 93 (1845).

The common law accepted by a state is not necessarily the common law as existed in England:

> "No one will contend that the common law, as it existed in England, has ever been in force in all its provisions in any state in this union. It was adopted so far only as its principles were suited to the condition of the colonies; and from this circumstance we see, what is common law in one state, is not so considered in another. The judicial decisions, the usages and customs of the respective states, must determine how far the common law has been introduced, and sanctioned in each." *Wheaton* v *Peters*, 33 US 591; 8 Pet 591; 8 L Ed 1055 (1834) [emphasis added].

That Michigan has adopted the common law is not disputed, yet a brief review of Michigan history will provide some perspective on what was in fact adopted.

The French explored what is now Michigan around 1620, and the first permanent settlement was founded at Sault Ste. Marie in 1668. *The World Book Encyclopedia*, Volume 13, p 422 (1984). After defeating the French in 1763, Britain won the Michigan region, among others. In 1774, the British made Michigan part of the province of Quebec, but when the Revolutionary War ended in 1783, the Michigan region came under the control of the United States. *Id.* In 1784, Virginia granted a deed of cession to the United States for land which included what now is Michigan.[9] *US* v *Chandler-Dunbar Water Power Co*, 152 F 25 (1907). Though the British did not surrender Detroit or Fort Mackinaw until 1796, the United States made the Michigan region part of the Northwest Territory in 1787. *Id.* In 1805, Congress established the territory of Michigan. *Id.* Michigan's first constitution was ratified in 1835, and Michigan became a state on January 26, 1837. *Id.* at 424.

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[9] As noted in *Shively*, since 1679, Virginia law has granted soil in tidewaters to low water mark. *Shively* at 24-25.

In *Stout* v *Keyes*, 2 Douglass 184 (1845), this Court traced Michigan's use of the common law back to the organization of the territorial government. The common law was "made the law of the Northwest Territory by the ordinance of 1787." *In re Sanderson*, 289 Mich 165; 286 NW2d 198 (1939). Prior to 1796, "the territory comprising this state remained under the control and jurisdiction of the British Government." *Abbot* v *Godfroy's Heirs*, 1 Mich 178 (1849). In response to a suggestion that the common law did not apply in this state, the *Abbot* court stated:

> "[T]his court, as well as the circuit courts, have been adjudicating common law actions upon common law rules and principles, since their organization under the state government; and also, the territorial courts had done so previously, from the organization of the territorial government under the acts of congress and the ordinance of 1787." *Id.* at 187, 188.

The court then explained that although Michigan's first constitution did not specifically refer to the common law, it did make provision for it:

> "It is contended, first, that the state constitution abrogated the common law, which it is conceded was previously in force. There is no provision in the constitution to that effect; but, on the contrary, in the second section of the schedule annexed to the constitution, the laws in force are retained until they should expire by their own limitations, or be altered or repealed by the legislature. And it is a general principle, that, upon a change of government, laws in force continue until changed or abrogated." *Id.* at 188.

Similar to what occurred in Massachusetts, when Michigan became a state in 1837, the common law as it had developed during the territorial period became the law of the new state.[10] Under the

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[10] See also *Lorman* v *Benson*, 8 Mich 18, 24 (1860):

> "It is undoubtedly true that at one time the custom of Paris was in force here. It was expressly abrogated by the territorial legislature in 1810, and probably applied to very few cases then, if to any. Practically the common law has prevailed here, in ordinary matters, since our government took possession; and the country has grown up under it. How, or by what particular means, it originated would open an inquiry more curious than useful. A custom which is as old as the American settlements, and has

authority of *Shively*, if upon statehood the state of Michigan acquired title to its Great Lakes shores and navigable rivers up to ordinary high water mark – as the MDEQ/MDNR urges – it did so because the common law of the state so provided. As explained below, the law of Michigan is to the contrary.

B. Michigan's Common Law Reflects Its Usages and Customs.

The *Shively* Court, and myriad decisions of the U.S. Supreme Court cited by it, referred to the question of ownership of the shore being one of "usage:"

> "[T]he nature and degree of such rights and privileges [in the shore below high water mark] differed in the different colonies, and in some were created by statute, while in others they rested upon usage only." *Id.* at 18.

The *Shively* Court's reference to usages was a reference to common law as it had developed in the colonies and states. The common law "embraces that great body of unwritten law founded upon general custom, usage, or common consent, and is based upon natural justice or reason." 15A Am Jur 2d, § 1. "It may otherwise be defined as custom long acquiesced in or sanctioned by immemorial usage and judicial decision."[11] *Id.*

As a reflection of custom and usage, the common law can be said to exist independent of the judiciary:

> "By a sort of legal fiction it is sometimes said that the common law rests wholly upon tradition and has always existed, having only been declared by the courts from time to time." *Id.* at § 2.

> been universally recognized by every department of government, has made it the law of the land, if not made so otherwise."

[11] See also the argument of plaintiff in *Lorman* v *Benson*, 8 Mich 18, 23 (1860):

> "And in the several states, the varying rules on this subject are traced to and rest upon usage and common understanding. In regard to these, usage makes the law. [citation omitted]. There is in fact no such thing as a general common law on this subject. Usage makes the local law."

Said in another way:

> "Neither the opinions nor precedent of judges can be said with strict propriety to be the law; they are only evidence of law." *Id.* at § 2, note 24, citing *Forbes* v *Scanneld*, 13 Cal 242 (1859).

Hence, a common law court such as this one does not make the law; it merely declares what it observes to be the law, and enforces that observation.[12]

C. Early Michigan Common Law Consistently Found Title to Michigan's Great Lakes Shores to be Vested in Riparian Owners.

Upon achieving statehood, Michigan's early courts drew upon the common law of England, as modified in the territorial period and adapted to Michigan's unique condition, and consistent with local usages and customs. This common law governed questions of property:

> "We are of the opinion that questions of property, not clearly excepted from it, must be determined by the common law, modified only by such circumstances as render it inapplicable to our local affairs." *Lorman* v *Benson*, 8 Mich 18, 26 (1860).

Amici submit that the best evidence of Michigan law at the time of statehood, on the question of the title to the shores of Michigan's navigable waters, and reflecting Michigan's unique condition, usage and custom, can be found in its early cases.

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[12] Compare this understanding of the law with an unfair and inaccurate characterization of this Court by the MDEQ on its website:

> "The State, by judicial fiat in the case of *Lorman* v *Benson*, 8 Mich 18 (1860), retained title to the bed of the Great Lakes, but surrendered title of the submerged soil of inland navigable waters to riparian owners."

(See "Public Rights in Michigan Waters" at <http://www.michigan.gov/dnr/0,1607,7-153-10366_15383-31738--,00.html>). In fact, the State, through this Court, surrendered nothing; the Court merely acknowledged the existing common law, and offered no finding which could be characterized as retaining title to the bed of the Great Lakes. That the Court did not do so is evidenced by the Court's subsequent decision in *Rice* v *Ruddiman*, 10 Mich 125 (1862) (see discussion, *infra*).

The earliest reported case on the topic is not from this Court, but a circuit court decision.[13] In *LaPlaisance* v *City of Monroe*, Walk Ch 155, the circuit court observed:

> "So, with regard to our large lakes, or such parts of them as lie within the limits of the state, the **proprietor of the adjacent shore** has no property whatever in the land covered by water." [Emphasis added][14]

The emphasized language in this early declaration of law, made only six years after Michigan's admission to the Union, shows the Michigan court's unquestioning acceptance of the proposition that the "proprietor" (a private party) owns the "shore" of riparian property adjacent to the Great Lakes, even as the court found that, along the Great Lakes, such ownership did not extend to the "land covered by water."

The next case disclosing the state of Michigan's early common law is *Lorman* v *Benson*, 8 Mich 18. That case involved a question of "doctrines applicable to riparian proprietors upon the water communication which is known as the Detroit River." 8 Mich at 24. The case involved land abutting the river north of Detroit. Lorman leased a parcel of land "bounded in front by the Detroit River." Benson, an earlier licensee whose license expired, refused to remove a boom constructed out in the water used to keep and secure logs. Lorman sought to use the shore and water to remove ice, and sought to remove Benson. Benson claimed a right to keep his boom in the waters as a member of the public. This Court disagreed, and ultimately held that

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[13] At the time of *LaPlaisance*, there existed five circuits of the Court of Chancery. Appeal from that court lies to the Supreme Court, which is the court of last resort. Walker, *Reports of Cases Assigned and Determined in the Court of Chancery of the State of Michigan*, preface, p vii (2nd ed 1878).

[14] It is important to read the decision carefully. In that case, the plaintiff did not claim to own any land adjacent to its wharf. Thus, when the court observed that "complainants do not own the bed, or the banks, of the river, below the point of obstruction," it was stating a fact, not a conclusion of law. Compare Brief of Amicus Curiae Michigan Land Institute, p 5, which inaccurately asserts that "*this* court" in *LaPlaisance* "intimated that both the bed and the 'banks' of water bodies are subject to public trust." The *LaPlaisance* court's language was quite the contrary.

because Lorman's lease ran to the middle of the river, Benson had no right to use of the soil for his boom or a right to store logs in front of Lorman's property. *Id.* at 32-33.

To decide the question, this Court considered both the common law and the need to modify it based on current usage. It first looked to the Northwest Ordinance, which designated navigable waters as public highways. *Id.* at 25. It then looked to the common law of England, "to see how and wherein our position may require a modification of them." *Id.* In England, there were "two kinds of water highways." First were the "rivers and streams above the ebb and flow of the tide" useful for navigation, which were "subject to the same general rights which the public exercises in highways by land." *Id.* Second, the "navigable waters in which the tide ebbed and flowed were also public highways." *Id.* at 26. While the banks and beds under waters above the tide were owned by the "adjacent proprietor," a grant of lands on the tide waters "stopped at the line of ordinary high tides." *Id.* The court then observed that in either case, the rights of the owner of the soil, whether the King or private owner, "were qualified by the public easement." *Id.* at 27. The private owner of lands under non-tidal waters had such use of the stream "as will not interfere with the public easement or servitude," which it described as "the same general rights which the public exercise in highways by land," or "the public easement of navigation." *Id.* at 25-27. The King's rights as to lands under tidal waters "were qualified by the public easement, precisely like those of a private owner of a non-tidal bed." *Id.* at 27. Notably, as it relates to the question of the shore, the court noted:

> "In both classes of streams the public easement controlled the use of the land. The **easement reached** the high water line **whenever the tide was up,** and **prevented any permanent improvements** below that [line] as effectually as below the ordinary river margin, and no more so, and for no different reason." *Id.* at 28 [emphasis added].

The *Lorman* court then specifically addressed the question of shore ownership, and the reasoning for the "principle which gives the land between high and low water mark to the crown:"

> "**It is land not capable of ordinary cultivation or occupation**; or, according to the description of Lord Hale, as generally dry and manurable; and so it is in the nature of unappropriated soil." *Id.* at 27, citing *Attorney General* v *Chambers*, 27 Eng L & Eq 242 [emphasis in original].

The *Lorman* court gives further instruction about the meaning of the foregoing, which is especially important to the question at issue in this case:

> "Lord Hale gives as his reason for thinking that lands only covered by the high spring tides do not belong to the crown, that such lands are for the most part dry and manurable; and, taking this passage as the only authority at all capable of guiding us, the reasonable conclusion is that the crown's right is limited to lands which are, for the most part, not dry or manurable." *Id.*, quoting *Attorney General* v *Chambers*, *supra*.

The *Lorman* court then made a conclusion of the state of the common law which is entirely consistent with *Hilt* v *Weber*, 252 Mich 198; 233 NW 159 (1930), as well as the result in *Peterman* v *DNR*, 446 Mich 177; 521 NW2d 499 (1994):

> "Here, then, we have the doctrine very clearly maintained, that the riparian owner takes all the land which is of any use for ordinary purposes, and all which is not commonly submerged by the average ordinary high tides, which would seldom leave any of the shore dry more than twenty four hours at a time. It is not reserved, therefore, as useful land, but as waste land which is characterized by the water service over it." *Lorman* at 29 [emphasis added].

This principle is equally applicable to the **relicted** lands acknowledged in *Hilt*, *supra*, parts of which may be uncovered for years, or even decades. Like the lands covered only by the spring tides in England, these relicted lands, where uncovered, become valuable for private use.[15] As such, they are not left to the sovereign as waste lands, but rather are given by the common law to the riparian proprietor who can make productive use of them. Indeed, in *Kavanaugh* v *Rabior*,

[15] See fn 2, *supra*, for an example of uses.

222 Mich 68; 192 NW 623 (1923), *Kavanaugh* v *Baird*, 241 Mich 240; 217 NW2d 2 (1928), and *Hilt* v *Weber*, *supra*, private cottages were erected on the **relicted** lands at issue in those cases.[16]

The *Lorman* court provided guidance not only on the issue of ownership of the shore, but on the public's rights therein as well:

> "But as the public are sometimes said to have rights to some easements on the shore, it may be well to notice what those rights are." *Id.* at 29.

Lorman then considered a trespass case brought by a private owner of "shore and uplands" against "the defendant for crossing the shore on foot, and with carriages and bathing machines," who claimed "a public right of way for bathing purposes." The *Lorman* court observed the rule established:

> "And it was laid down as a general rule, that the public rights over the shore existed **not as land, but as water rights,** to be exercised when the land was covered by the tide...And, while it was said that it was quite common to use the shore for various purposes of passage, that use was regarded not as rightful, but merely by sufferance, and analogous to the frequent passage over **uninclosed** lands, [17] which was not lawful, but was seldom complained of." [emphasis added]. *Id.* at 29-30, citing *Blundell* v *Catterall*, 5 Barn & Ald 268.[18]

The *Lorman* court concluded its consideration of the common law by observing that "[b]y giving in **all cases the whole extent** of dry and available land to the bordering owner, the

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[16] In *Hilt*, a shack – also characterized as a cottage – was built on the relicted land at issue, and the occupant had refused to move. See *Hilt* record, pp 103, 105-107. A witness noted that based on the meander line rule, Weber was powerless to remove the cottage or its occupant. *Id.*

[17] Michigan has acknowledged the rule regarding passage over wild and uninclosed lands. See Amicus Curiae Brief of Save Our Shoreline and Great Lakes Coalition, Inc., p 47, citing *Dumez* v *Dykstra*, 257 Mich 449; 241 NW 182 (1932).

[18] *Lorman* characterized this case as containing "a more full investigation of this subject than any other modern case to which our attention has been called." *Id.* at 29. The *Blundell* case from England involved the question of public rights on the seashore, and is widely cited in state and federal decisions of this country. Notably, as she does in several instances in her presentation, without so informing the Court, Plaintiff relied upon the lone dissenter in this case for her assertions of law. See Plaintiff's Brief, p 10; *Lorman*, 8 Mich at 29. This Court should be extremely vigilant in checking Plaintiff's representations throughout her brief.

law left to the crown, in any case, a very unprofitable ownership, which could rarely aid him, or any grantee, unless the latter also owned the upland [emphasis added]." *Id.* at 30.

Finally, in deciding that the lessee of the upland had "a legal interest in the land covered with water, which will support the action of trespass," the *Lorman* court considered the issue of usage:

> "Had the usage of this region been inconsistent with the rule we have adopted, that might afford some reason for doubting its applicability. But usage has uniformly conformed to it, and, so far as we have any legislation bearing upon the subject, it recognizes the rights of private owners fully." *Lorman* at 33.

The *Lorman* decision was unanimous. While *Lorman* involved the Detroit River, and not the Great Lakes, the principles announced in that case are equally applicable to the Great Lakes shores.

Two years later, the same four justices from *Lorman* considered another case involving the question of shore ownership and riparian rights in *Rice* v *Ruddiman*, 10 Mich 125 (1862). That case involved Muskegon Lake – a lake nearby and connected to Lake Michigan. The parties stipulated that the lake was part of Lake Michigan, but the Court disagreed. As it pertains to this appeal, the Court declined to affirm the following charge to the jury:

> "The court therefore charged the jury, that the riparian owner upon the shores of Lake Michigan has no proprietary interests in the soil covered by the water, to the center line of said lake, but his rights of soil terminate at ordinary high water mark." *Id.* at 131.

Instead, the four justices writing separately agreed that Muskegon Lake was not part of the Great Lakes, and that the issue of shoreline ownership along the Great Lakes was not properly before them. Instead, they considered the lake an interior lake, and subject to the same rules as the state's navigable rivers and streams. As a result, they properly did not reach the question of Great Lakes riparian ownership. But that did not stop the justices from expressing their views on

the topic, providing to us a glimpse of the common law, custom and usage of the time. Justice Campbell, the drafter of the *Lorman* decision, commented:

> "And, while I think that the particular place in controversy is no part of Lake Michigan, I do not regard the distinction as at all material. Usage as well as reason extends to the one as well as to the other . . . But, [w]herever use can be and is made of the bed of the water, in improvements near the shore, in waters not governed by the artificial common law rules of tide water ownership, I think the rules applicable to fresh water rivers are more reasonable and just, and are certainly more conformable to the common understanding and usage. They preserve all valuable public privileges, and interfere with no rights whatsoever." *Id.* at 146-147 [emphasis added].

Justice Christiancy, while careful to not express a firm opinion on the issue, still offered that:

> "I speak here of the small lakes *within* the State, because the large lakes on our borders are not involved in the present case . . . and I must frankly admit that I have not, as yet, seen any sound reason for making a distinction based upon a difference of size between lakes more than between rivers: *Jones* v *Soulard*, 24 How 40 – nor because some may be a state or national boundary, while others are not." *Id.* at 140-141.

Justice Martin concurred "fully in the views of" Justice Christiancy, but was not as hesitant to espouse his view on the question of distinguishing between the rights of a riparian proprietor on interior lakes or the Great Lakes:

> "I think the rights of the riparian proprietors upon our interior lakes – and I regard Muskegon Lake as such, and not as an arm of Lake Michigan, notwithstanding the stipulation in this case (which although it must be taken for true, I must regard as immaterial) are the same as those of proprietors upon our navigable streams." *Id.* at 147.

Finally, and in slight contrast, Justice Manning thought it "absurd" to apply the common law rule – giving an owner of land on a river above the tide water the bed of the stream to the middle of the river – to "our large lakes." *Id.* at 143. He nevertheless agreed that riparian owners had "natural rights," as well as the force of custom, to build wharves, piers, mills and manufacturies, even out into the water of those lakes. This rule, in his view, "turns to a good account what would only be a profitless monopoly in the hands of the State." *Id.* at 146.

Unlike the justices of even the *Hilt* Court, the *Lorman* and *Rice* justices were presumably alive in 1837, and were in a peculiar position to observe the custom and usages of the time. **Not one of them expressed agreement with the trial court's charge of the high water mark as the boundary on the Great Lakes, and three found no reason to treat the lakes differently from the state's navigable rivers.** Amici herein submit that the *Lorman* and *Rice* decisions may offer the best evidence of Michigan law at the time of statehood. From those decisions comes the principle recognized and unambiguously declared as the law a lifetime later in *Hilt*: the state owns the soil covered by water, and not to any so-called "high water mark." In other words, the riparian owner owns to the water's edge, the point at which the soil is no longer covered with water, and the point the public can no longer navigate.

III. MICHIGAN COMMON LAW CONTINUES TO FIND TITLE TO GREAT LAKES SHORES IS VESTED IN ADJACENT UPLAND OWNERS

As demonstrated in the Briefs of Appellee and amici Save Our Shoreline, excepting only the *Kavanaugh* cases,[19] our Michigan cases have consistently held that the adjacent owner on our largest navigable bodies – the Great Lakes – is the owner of the dry shore land to the water's edge. Amici herein support the analysis of the pre-*Hilt* cases in those briefs, and will not repeat that analysis here. But we will observe that, reflecting Michigan's usage and custom, not one of those cases found title in the state to the ordinary high water mark, as argued by Plaintiff and her amici. Instead, the weight of the varying decisions and opinions decidedly reflects a general understanding that title to the Great Lakes shores is vested in adjacent owners. In light of the nature of the common law as reflecting common usage and custom, the significance of Professor Steinberg's observation that "property owners along Michigan's shores believed that they owned

[19] *Kavanaugh* v *Rabior*, 222 Mich 68; 192 NW 623 (1923); *Kavanaugh* v *Baird*, 241 Mich 240; 217 NW2d 2 (1928), rev'd 253 Mich 631; 235 NW 871 (1931).

to the water's edge" cannot be understated. Steinberg, "God's Terminus: Boundaries, Nature, and Property on the Michigan Shore," The American Journal of Legal History, Vol. XXXVII, p 72 (1993). Yet further evidence of usage and custom in Michigan is found in *LaPorte* v *Menacon*, 220 Mich 684; 190 NW 655 (1922). That case involved a grant to the "shore of Lake Erie." At issue was the meaning of the grant. This Court first looked to the intent of the parties, finding that the plaintiffs intended the conveyance to include "all of the land owned by them bordering on Lake Erie, including the water rights appurtenant thereto." *Id.* at 686. The Court then concluded:

> "But apart from this we think the word 'shore' has a well-understood meaning, and that a grant to the shore of Lake Erie means to the **water's edge** at its lowest mark.
>
> Correctly speaking, the word 'shore' applies only to the land adjacent to the sea or other tidal waters; it is the space or ground over which the tide ebbs and flows, and is bounded by the high and low water mark. Our Great Lakes are not tidal waters. What then is meant by the shore of a lake unaffected by the tides? It is the land adjacent to the water, but how far from the **water's edge** does it begin? In the absence of any banks or other highlands to mark the boundary, the only definite line it has is the **water's edge.**
>
> > 'The word 'shore is strictly applicable only to the space between ordinary high and low water mark on a tidal river, sea, or lake; but it is sometimes loosely used with reference to fresh water rivers, denoting that portion of the bank which touches the margin of the stream at low water.' *Kinney Irrigation and Water Rights*, Vol 1 §305.
> >
> > 'While always a question of construction depending on the true intent of the parties as derived from a consideration of the whole instrument, specific calls in a description of the boundaries of land to the edge, bank, or shore of a water course, pond, or lake, will, as a rule, be construed to limit the grant or conveyance to the water's edge. C J Vol 9, pp 193, 194, citing *Stover* v *Lovoia*, 8 Ont W R 398, where it is held: 'Along the shore of a nontidal river or of a navigable inland lake is now well understood to mean along the edge of the water at its lowest mark, both in this country and the United States. That may be called the American use of the word 'shore,' which in England is reserved for the ocean, and has there a more limited meaning.''

> A grant to Ainsworth and Hurst carries to the water's edge, and therefore includes the shore, with all riparian rights. This was the extent of the plaintiffs' ownership." *Id.* at 687-688.

The *LaPorte* decision well represents Michigan's custom and usage as to shore ownership, and this understanding was confirmed by this Court in *Hilt*.

> In its 1963 constitution, Michigan adopted then-existing common law:
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> "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed." Mich Const 1963, art 3, § 7.

The framers of a constitution are presumed to have a knowledge of existing laws and to act in reference to that knowledge. *Hall* v *Ira Twp*, 348 Mich 673; 83 NW2d 443 (1957). At the time of adoption of the 1963 constitution, the *Hilt* Court's holding of riparian title to the water's edge was the outstanding decision on the issue of ownership of Great Lakes shores. By adopting the constitution, this state in 1963 implicitly adopted the rule of ownership to the water's edge, then prevailing consistently for over 40 years. That rule remains the law of this state, at least until changed or modified.

IV. THE RESULT REACHED BY THE *PETERMAN* COURT IS ENTIRELY CONSISTENT WITH THE COMMON LAW AS DEFINED IN *HILT*.

In the Amici Curiae brief filed by the Michigan Department of Environmental Quality and the Michigan Department of Natural Resources, it appears that those governmental agencies fundamentally misunderstand the holding of *Peterman* v *Dep't of Natural Resources*, 446 Mich 177; 521 NW2d 499 (1994). In that regard, the MDEQ and MDNR relied on *Peterman* for the proposition that the State holds title in trust, not just to submerged lands, but also extending inland to the "ordinary high water mark" referred to in the Great Lakes Submerged Lands Act ("GLSLA"). *See* Brief of Amici Curiae MDEQ/MDNR at pp 4 and 16-17. This characterization of *Peterman* is untenable. Instead, for the reasons explained below, the holding of *Peterman*

compels the Court to hold that the State's title ends at the water's edge, and that the riparian owner's private title begins at the same point.

All parties and their amici concede that the *Peterman* Court awarded just compensation to the plaintiff-riparian owner for the loss of lands above the ordinary high water mark resulting from the MDNR's negligent construction of a boat launch. The important fact that Appellant and her amici (including the MDEQ and the MDNR in particular) gloss over, presumably in hopes of misleading this Court, is that the *Peterman* Court also awarded the plaintiffs-riparian landowners just compensation for the loss of lands ***below*** the ordinary high water mark, extending to the water's edge. *Peterman,* supra at 200-202. Recognition of this fact is essential to a proper understanding of *Peterman* for the reason that (1) the *Peterman* Court expressly recognized that it was awarding compensation for loss of ***private*** lands below the ordinary high water mark, and (2) private ownership of land is, under Michigan and federal "takings" jurisprudence, the *sine qua non* for any award of just compensation.

The precise language repeatedly employed in the *Peterman* decision makes clear that the Court understood it was awarding just compensation for the taking of the plaintiffs' ***private*** lands lying below the high water mark:

> "[W]hile the general rule is that only the loss of fast lands must be compensated, plaintiffs suggest that because **the loss of the beach below the high-water mark** was unnecessary to construct the boat launch, the navigational servitude does not insulate the state from a duty to pay compensation. Indeed, the trial court found that defendant's unscientific construction and design of the jetties proximately caused the destruction of **plaintiff's beach**. **As an unnecessary taking of property, defendant's actions violated the strict dictates of the constitutional guarantee that private property** may be taken only when necessary for public purposes. *Humphrey, supra* at 474-475; *Paul, supra* at 119.
>
> * * *

> While generally the navigational trust[20] permits the state to improve waterways without compensating for nonfast lands, the trust does not grant blanket authority to destroy **private property**–the loss of the property must be necessary or possess an essential nexus to the navigational improvement in question. In the instant case, no essential nexus existed between the construction of the boat launch and the utter destruction of **plaintiff's beach.** The taking of the property served no public interest because the ramp could have been built without destroying **plaintiff's property**. Thus, we affirm the trial court's award of damages for the loss of **plaintiffs' property**." *Id.* at 200-202 [emphasis added].
>
> The *Peterman* Court again stressed this same point at footnote 35 of its opinion:
>
> "[S]imply because the state's actions further its trust in navigable waters, the state does not possess the power to destroy **private property interests** with impunity.
>
> * * *
>
> The unscientific construction of the jetties had no relation to the navigable servitude because the jetties could have been constructed to further navigation and, at the same time, not destroy **plaintiff's property**." *Id.* at 202, fn 35 [emphasis added].

Thus, under *Peterman* and the 75 years of consistent case law on which it is based (including *Hilt v Weber, supra*), the Court must recognize that a riparian property owner's fee interest extends lakeward to the water's edge.

V. NEITHER PLAINTIFF NOR HER AMICI HAVE DEMONSTRATED A NEED TO DECLARE A CHANGE IN MICHIGAN'S COMMON LAW.

Amicus Tip of the Mitt Watershed Council at pages 26 to 31 of its Brief, and Amici Michigan Department of Environmental Quality and Michigan Department of Natural Resources

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[20] Note the Court's reference to the public's right of navigation, as opposed to the "public trust." *Peterman*'s introduction of the term "navigational trust" is unprecedented in Michigan jurisprudence. While Amici generally agree with the *Peterman* decision, the introduction of this term, as well as an application of the navigational servitude to dry land, finds no support in Michigan, and Amici questions the correctness of this part of the decision. The Court's conclusions in this case finding a right to compensation in the riparian for loss of his beach below the Ordinary High Water Mark renders this conclusion as dicta. It is noteworthy that this part of the Court's decision is not the subject of any of the briefs of the parties. It is also important to recognize that the public trust and the navigational servitude are not one and the same, as suggested by other Amici. See Michigan Land Title Standards 24.3, Comment B ("The rights of the public in the Great Lakes include, but are broader than, its rights under the navigational servitude").

at pages 8 and 9 of their Brief, argue that unless the State of Michigan is found to have a public trust interest extending landward of the water's edge along Michigan's Great Lakes shorelines, the State's authority to control activities occurring between the ordinary high water mark and the water's edge will be compromised. There is no merit to this argument.

A. The State May and Does Regulate the Shores

At an early point in this country's legal history, courts strained to find the existence of a sovereign ownership or public trust interest so as to justify state regulatory efforts. Subsequent judicial recognition and expansion of the police power as the basis for federal and state regulation have negated any need to find that the sovereign owned or held an interest in trust to justify regulation. Based solely upon the police power, the State of Michigan has enacted a complex regulatory program pertaining to natural resources and the environment. Thus, no regulatory void will be created if this Court confirms that the public trust interest in submerged beds of the Great Lakes extends only to the water's edge.

Early efforts to uphold federal or state regulatory programs were based upon the sovereign power flowing from ownership simply because the police power was then construed very narrowly. Lazarus, *Changing Conceptions of Property in Sovereignty and Natural Resources: Questioning the Public Trust Doctrine,* 71 Iowa L Rev 631, 665 (1986). The public trust doctrine originated during those times. Early decisions, limiting regulatory authority to situations where the sovereign owned or held a trust interest in the subject to be regulated naturally led to the invention of convoluted theories of sovereign ownership which then would allow the sovereign to assert control. Ultimately, however, the United States Supreme Court rejected these legal fiction[s] "of state ownership and expanded the police power as the basis for federal and state regulation." *Sporhase ex rel Douglas* v *Nebraska*, 458 US 941, 951; 102 S Ct

3456; 73 L Ed 2d 1254 (1982); *Hughes* v *Oklahoma*, 441 US 322, 335; 99 S Ct 1727; 60 L Ed 2d 250 (1979).

In more modern times, Michigan has adopted a complex regulatory scheme to protect natural resources and the environment based upon the police power. See, for example, the various parts of the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.101, *et seq.* These natural resources and environmental protection laws include protections for inland lakes and streams (Part 301), wetlands (Part 303), natural rivers (Part 305), inland lake levels (Part 307), the Great Lakes (Parts 321-341), wilderness and natural areas (Part 351), and sand dunes (Part 353), among others. There are extensive provisions relating to pollution control. See Parts 31 through 215. This regulatory regime does not rely solely upon ownership to sustain the regulatory burden imposed thereby.

For example, there is no public ownership or trust interest in privately owned sand dunes or wetland areas, and yet the State regulates uses occurring in those areas. Clearly, whenever the State has deemed it necessary to protect the public health, safety and welfare by regulating use of natural resources or environmentally sensitive areas, it has been able to do so regardless of any lack of sovereign ownership or public trust interest. The same would be true for Great Lakes shoreland areas between the water's edge and the statutory high water mark. Regulation under the police power, subject to constitutional protections, can be enacted as necessary so as to protect the public health, safety, and welfare.

Concededly, regulation by way of the police power places limitations on governmental power, such as the requirement that the regulation be reasonable. For example, Part 323 of the NREPA authorizes the MDEQ to regulate shoreland areas which it designates as an "environmental area" if it can show, by way of studies, that such area is "necessary for the

preservation of fish and wildlife." MCL 324.32301. If this Court finds title in the state, the MDEQ will be unbridled by any showing of necessity. Indeed, based on its view of ownership, the MDEQ has already proceeded in this manner. See Attachment 1, Briefing Report, revised May 22, 2000 ("ownership alone should allow us to regulate the removal of bottomland vegetation" instead of utilization of Part 323, which "would require us to document the value of the habitat.") Certainly, requiring that regulation be reasonable does not unduly restrain the state.

Favoring the police power over concepts of title to support governmental regulation also limits the power of the state to convey the shores. In *Shively*, the state used its public trust title of the shores to high water mark to convey those shores to owners other than the adjacent riparians, interposing a fee between the upland and the waters. Yet even the MDEQ has not carried its interpretation of ownership this far.[21]

Thus, given the breadth and scope of the police power which federal and state governments have at their disposal, there is no regulatory void created by this Court's confirming that under *Hilt* v *Weber*, the state's ownership and public trust interest in submerged lands of the Great Lakes ends at the water's edge.

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[21] The MDEQ does assert reliance on the statutory ordinary high water mark designation in MCL 324.32501 *et seq.*, indicating that it has issued "thousands of deeds, leases and use agreements, and permits" under the statute. Aside from issuing "deeds to riparians," the MDEQ makes no assertion that it granted conveyances to those other than riparians. In view of the purpose of the Great Lakes Submerged Lands Act to state the upper limit of the state's title when covered by water, the fact that the MDEQ used that boundary in conveyances to adjacent riparians will be unaffected by confirming *Hilt's* holding of title at the water's edge. If the MDEQ had conveyed lands below ordinary high water mark to non-riparian third parties, this court might have cause for concern. But the MDEQ makes no such assertion, and offers not a single example of how a conveyance by it might be negatively affected by affirming *Hilt*.

B. The Common Law Itself Provides a Remedy to the State

It has long been held that a riparian cannot erect structures which unreasonably interfere with the public's right of navigation. For example, this Court has said:

> "The public, through their proper authorities, have always the right to restrain any encroachments which may be injurious to the public right, and to compel the removal of any obstruction or impediment, as well as to punish the offender, to the same extent as if the bed of the lake were vested in the State." *Grand Rapids* v *Powers*, 89 Mich 94, 110; 50 NW 611 (1891).

CONCLUSION AND RELIEF REQUESTED

Seventy five years ago, this Court, in *Hilt* v *Weber,* ended a relatively brief controversy regarding the boundary between public and private ownership along Michigan's Great Lakes shorelines created by its earlier decisions in the *Kavanaugh* cases. *Hilt* v *Weber* returned the common law on this issue to that which existed at (and even prior to) the time Michigan became a state. Under United States Supreme Court precedent in *Shively* v *Bowlby* and subsequent cases, the boundary between public and private interests (including a state's public trust interest) along water bodies such as the Great Lakes is a matter of state law. The decision in *Hilt* v *Weber* (reaffirmed in *Peterman, supra*) that Great Lakes riparian property owners hold title to the water's edge free of the public trust was simply a reconfirmation of long standing Michigan law.

The Court of Appeals reached a correct result when it held that Great Lakes riparian property owners have the right to exclusive use of their property all the way to the water's edge. But it unfortunately failed to fully comprehend and articulate that such exclusive use was but one stick of the "moveable freehold" title bundle held by such owners, and that the public trust held by the State of Michigan in submerged lands of the Great Lakes stops at the point where the landowner's title begins: the water's edge.

While the Appellant and various supporting amici contend that any decision determining that Great Lakes riparian property owners hold title to the water's edge free of the public trust

will create a regulatory void along the Great Lakes shoreline and lead to the barricading of the beaches, history proves them wrong. See Attachment 2, "Supplemental Brief for Plaintiffs on Overruling the Kavanaugh Cases," p 55. Given the scope and extent of the federal and state police power, there is no jurisprudential need to rely upon the public trust interest to protect natural resource or environmental values along the Great Lakes shorelines. The Michigan Legislature has successfully relied upon the police power in enacting a complex and comprehensive regulatory program to protect such interests and will continue to have such authority to protect such interests along the Great Lakes shorelines if this Court corrects the Court of Appeals' misapplication of *Hilt* v *Weber*. Further, in the 75 years which have passed since *Hilt* v *Weber* reconfirmed that the Great Lakes riparian property owners hold title to the water's edge free of the public trust, there has been no denigration of environmental or natural resource values along the Great Lakes shorelines attributable to such an allocation of rights, nor has there been a barricading of the beaches to keep the public out.

Thus, this Court, in keeping with its prior precedent, should hold that Great Lakes riparian property owners hold title to the water's edge free of the public trust, thus reaffirming a fundamental principle recognized by usage and the common law since the date Michigan became a state.

Respectfully submitted,

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Dated: April 15, 2005

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ATTACHMENT 1

17

BRIEFING REPORT
Destruction of Coastal Marshes

Issue

A number of Saginaw Bay riparian property owners are mowing emergent marsh vegetation and tilling Great Lakes bottomlands. This practice destroys valuable coastal wetland habitat.

Background

Great Lakes water level fluctuations are normal and have occurred for decades in response to precipitation and evaporation. Average or above average lake levels have been experienced for the last 30 years, with the last period of below average water levels in 1963-65. High Lake Huron water levels inhibit emergent vegetative growth and erode the lake bottom to the detriment of coastal wetland resources, especially along Saginaw Bay. However, high water conditions also provide many riparian owners with sand beach and a clear view of Saginaw Bay. Normal to low water levels experienced in late 1998 and 1999 have exposed large areas of bottomlands and promoted the natural resurgence of Saginaw Bay coastal marsh habitat. This marsh habitat provides valuable breeding, rearing, feeding, and resting habitat for a diverse group of wildlife species, especially waterfowl. Marshes with standing water also provide valuable fish spawning and rearing habitat. Destruction of this habitat disrupts the natural life cycle of the native plants and animals of Saginaw Bay.

Property owners in Huron, Arenac, and Bay counties have begun mowing vegetation up to 300 feet lakeward of the ordinary high water mark to maintain a view of the water. Many are also tilling the Great Lakes bottomland to retard vegetation growth. Mowing and tilling of coastal wetland vegetation is an escalating practice along the Saginaw Bay coastline.

Conclusion

We believe that we have the authority and responsibility to protect coastal marshes on the bottomlands of the Great Lakes because Great Lakes bottomlands are owned by the state. Ownership alone should allow us to regulate the removal of bottomland vegetation. Existing regulatory authorities, principally Part 5, General Powers and Duties; Part 303, Wetland Protection; Part 323, Shorelands Protection and Management; and Part 325, Great Lakes Submerged Lands, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, could address this issue. We believe that authorization to remove vegetation by a riparian owner should be granted for the exercise of their riparian rights, but the authorization should be limited to a six-foot wide path, as opposed to total clearing.

Recommendation

There are two options available to address this issue. The first option is to utilize the existing authority of Parts 5, 303, and 325. The second option is to utilize Part 323 to designate these bottomlands as "Environmental Areas."

Part 323 regulates any alteration of vegetation in Environmental Areas; those areas necessary for the preservation of fish and wildlife. Part 323 specifically authorizes regulation of "those lands between the ordinary high-water mark and the water's edge." The DEQ could designate these areas as Environmental Areas in about 30 days, pursuant to the existing administrative rules. This approach would require us to document the value of the habitat.

Consultations with the Department of Attorney General and the Department of Natural Resources leads us to conclude that the mowing and tilling of these coastal marshes is a regulated activity. We recommend taking action through the following steps: 1) advise legislators and local units of government of the DEQ's position and proposed action; 2) issue press releases; 3) notify riparian owners currently practicing coastal wetland mowing and tilling that this practice is in violation of state statute and should not be continued; and 4) take enforcement actions, as necessary, to curtail the mowing of coastal wetlands and the tilling of state-owned bottomlands.

A press release and letters to property owners regarding Parts 5, 303, and 325 authority have been prepared.

Prepared by: Douglas F. Morse, Senior Biologist
Land and Water Management Division
Saginaw Bay District Office
Department of Environmental Quality
December 17, 1999
Revised May 22, 2000

ATTACHMENT 2

STATE OF MICHIGAN

SUPREME COURT

John R. Hilt, and Margaret Hilt, *Plaintiffs and Appellants*, v. Herman H. Weber, and Rosa Weber, *Defendants and Appellees.*	Cal. No. 34491. No. 24, Oct. 1929, Term.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS ON OVERRULING KAVANAUGH CASES.

The court under date of January 7, 1930, extended the privilege to counsel interested in the above cause to brief the question whether or not the cases of *Kavanaugh v. Rabior* and *Kavanaugh v. Baird,* should be overruled, and being firmly of the opinion that these cases should be overruled, we accept the offered privilege and in this brief set forth our reasons for our convictions of said matter.

Had it not been for this well known and long established rule, the cases in question would have been reviewed by an appellate court long ago, but such review, because of such rule, will not lie.

> *State ex rel. Board of Comm. v. Capdeville, 146 La., 94; 64 L. Ed., 727.*

Counsel for defendant, as a matter of good business, ask on page 18 of their brief, that this beach or frontage property be put up for sale at public auction instead of giving it away, to lessen taxes which they claim are now excessive. This statement is not only absurd but ludicrous. We could scarcely imagine the state of Michigan, under whose protection and guidance we all abide, holding auction sales up and down the shore striking off this intervening or shore lands at the very front doors of adjacent cottages, residences and costly summer homes to the highest bidders to raise revenues for the state and lessen taxation. If the state should enter such business and engage in such practices, I venture to say that many of us, except perhaps defendants' counsel, would lose some little respect we now have for the state in which we live. A paragraph from Mr. Farnam in his work, *Farnham on Waters, Vol. 1, page 208,* is quite in point where he says:

> "In case the title does not pass with the upland, all that is accomplished is that the state reserves a strip of land which in most instances the purchaser of the adjoining land has reason to think he is acquiring and requires him to make extra compensation for it to the emolument of the state. Such practice should be beneath the dignity of a free and independent people. The attempt to enforce such a doctrine was one of the grounds for depriving Charles I of his crown and no citizen after in good faith purchasing lands which he has every reason to believe extends to the water can be deprived of it and have as much regard for his country after it has stepped in and required him to pay an additional compensation therefor."

Counsel on page 18 of their brief anticipate that riparian owners would build *barbed wire fences* from their boundary lines clear to the water and ask what would become of the state parks on this intervening land?

I can scarcely imagine people desirous of and purchasing frontage property for residential purposes, marring the beauty thereof by building barbed wire fences to protect their isolation. If the defendants purchased this property with such ends in view, he should be given the right, chiefly for the protection of his neighbors and adjacent property owners. Defendants desired this land and complained because they did not acquire it, and as a consequence instituted this suit. Now their counsel vigorously protest because they may acquire more than they even claim they bargained for and points out the many disadvantages that would accrue to the state by the defendants acquiring what they thought they were getting. The defendants are at the least hard to please and I confess that I am unable to follow their reasoning.

Personally, I know of no leases from the state of these shore lands, nor buildings having been built thereon. If such buildings exist, such are personal property and may be removed by the owners thereof,